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No. 92-168

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROY H. WARREN, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Social Security Act provides that World War II military service does not count toward eligibility for Social Security benefits if a federal agency has determined another benefit based on military service "to be payable." 42 U.S.C. 417(a)(1)(B). The question is whether Section 417(a)(1)(B) bars petitioner, who received Civil Service retirement benefits based in part on his military service, from counting his military service toward the receipt of Social Security benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14-29) is unreported. The decision of the district court (Pet. App. 58-65) adopting, with modification, the report and recommendation of the magistrate (Pet. App. 30-46) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1992. The petition for a writ of certiorari was filed on June 12, 1992. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. 417(a) provides, in pertinent part:

> (1) For purposes of determining entitlement to and the amount of any monthly benefit for any month after August 1950, or entitlement to and the amount of any lump-sum death payment in case of a death after such month, payable under this subchapter [42 U.S.C. 401 *et seq.*] on the basis of the wages and self-employment income of any World War II veteran and for purposes of section 416(i)(3) of this title [42 U.S.C. 416(i)(3)], such veteran shall be deemed to have been paid wages (in addition to the wages, if any, actually paid to him) of $160 in each month during any part of which he served in the active military or naval service of the United States during World War II. This subsection shall not be applicable in the case of any monthly benefit or lump-sum death payment if—
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> * * * * *
>
> (B) a benefit (other than a benefit payable in a lump sum unless it is a commutation of, or substitute for, periodic payments) which is based, in whole or in part, upon the active military or naval service of such veteran during World War II is determined by any agency or wholly owned instrumentality of the United States (other than the Veterans Administration) to be payable by it under any other law of the United States or under a system established by such agency or instrumentality.

* * * * *

(2) Upon application for benefits or a lump-sum death payment on the basis of the wages and self-employment income of any World War II veteran, the Secretary shall make a decision without regard to clause (B) of paragraph (1) of this subsection unless he has been notified by some other agency or instrumentality of the United States that, on the basis of the military or naval service of such veteran during World War II, a benefit described in clause (B) of paragraph (1) of this subsection has been determined by such agency or instrumentality to be payable by it. If he has not been so notified, the Secretary shall then ascertain whether some other agency or wholly owned instrumentality of the United States has decided that a benefit described in clause (B) of paragraph (1) of this subsection is payable by it. If any such agency or instrumentality has decided, or thereafter decides, that such a benefit is payable by it, it shall so notify the Secretary, and the Secretary shall certify no further benefits for payment or shall recompute the amount of any further benefits payable, as may be required by paragraph (1) of this subsection.

(3) Any agency or wholly owned instrumentality of the United States which is authorized by any law of the United States to pay benefits, or a system of benefits which are based, in whole or in part, on military or naval service during World War II shall, at the request of the Secretary, certify to him, with respect to any veteran, such information as the Secretary deems necessary to carry out his functions under paragraph (2) of this subsection.

20 C.F.R. 404.1342(c) provides, in pertinent part:

> You do not get wage credits for the World War II period if another Federal benefit (other than one payable by the Veterans Administration) is determined by a Federal agency or an instrumentality owned entirely by the United States to be payable to you, even though the Federal benefit is not actually paid or is paid and then terminated, based in part on your active service during the World War II period[.]

STATEMENT

1. Petitioner served on active duty with the Navy from 1943 to 1946 and was a civilian employee of the Air Force from 1951 to 1971. After he suffered an on-the-job back injury, an application for disability compensation was filed on his behalf with the Office of Federal Employees Compensation of the Department of Labor (DOL). Eligibility for disability compensation turned solely on petitioner's civilian service with the Air Force. During the delay in processing by DOL, petitioner began receiving retirement payments from the United States Civil Service Commission. Pet. App. 15-16. Petitioner testified that he did not initiate a claim for Civil Service retirement benefits, but that Air Force personnel submitted it without his authorization. *Id.* at 34. Petitioner, however, accepted $6,385 in Civil Service retirement benefits, which were based in part on petitioner's military service. *Id.* at 16-17.

Petitioner received retirement payments from the Civil Service Commission until DOL approved his disability claim. Pet. App. 17. At the Commission's request, DOL then reimbursed it for payments the Commission had made to petitioner. DOL continued to pay disability benefits to petitioner until 1980, when it determined that petitioner could not establish that his

prior injury continued to result in disability or loss of earning capacity. Petitioner then began receiving retirement payments from the Commission again.[1] DOL later reinstated petitioner's disability compensation benefits and again reimbursed the Commission for the payments it had made. *Id.* at 17-18.

2. Petitioner filed an application for Social Security retirement benefits in 1986. Pet. App. 19. To qualify, he needed 36 quarters of covered employment. Petitioner had only 28 quarters of covered civilian employment, but more than 36 quarters of employment if his military service was included. *Id.* at 20-21. Petitioner's claim was denied at all administrative levels on the ground that his military service could not be credited for Social Security purposes since it had been used for determining Civil Service retirement benefits. *Id.* at 19-20.

That conclusion was based on 42 U.S.C. 417(a) and 20 C.F.R. 404.1342(c). Section 417(a)(1)(B) provides that military service during the World War II era does not count for purposes of determining Social Security benefits if "a benefit * * * which is based, in whole or in part, upon the active military or naval service of such veteran during World War II is determined by any agency or wholly owned instrumentality of the United States (other than the Veterans Administration) to be payable by it under any other law of the United States or under a system established by such agency or instrumentality." The regulation explains: "You do not get wage credits for the World War II period if another Federal benefit (other than one payable by the Veterans Administration) is determined by a Federal agency or an instrumentality owned entirely by the United States to

[1] The court below found that petitioner "apparently" applied for Civil Service retirement benefits in 1980. Pet. App. 18. Petitioner disputes that finding. Pet. 7-8; see Pet. App. 62-63.

be payable to you, even though the Federal benefit is not actually paid or is paid and then terminated, based in part on your active service during the World War II period." Since the Civil Service Commission had determined that retirement benefits were payable to petitioner, and those benefits were based in part on petitioner's military service during the World War II era, the administrative law judge found that petitioner did not qualify for Social Security retirement benefits. Pet. App. 54-55.

3. After petitioner sought judicial review of the denial of his claim, a magistrate recommended that petitioner's complaint be dismissed. Pet. App. 30-46. The district court agreed. As an initial matter, however, the district court found no evidence to support the magistrate's conclusion that petitioner apparently had "applied for Civil Service Retirement Benefits in 1980." *Id.* at 60. But whether petitioner had applied for Civil Service retirement benefits is "immaterial to the ultimate resolution of the case" (*ibid.*), the court explained: "the test is whether such a benefit 'has been determined by such agency or instrumentality to be payable by it'" (*id.* at 62). Since the Civil Service Commission had determined that a benefit based in part on petitioner's World War II service was "payable by it," the district court concluded that the administrative decision refusing to credit that service for Social Security purposes was consistent with 42 U.S.C. 417(a) and the applicable regulation. The court further found that 20 C.F.R. 404.1342(c) is consistent with 42 U.S.C. 417 and was applied appropriately in this case. Pet. App. 65.[2]

[2] The district court also found no evidence that petitioner had objected to his receipt of Civil Service retirement benefits. It added that "[i]f the Civil Service Commission made an erroneous retirement eligibility determination using the [petitioner's] active duty military service to compute the entitlement, [petitioner] can,

4. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 14-29. It found that petitioner "has received Federal benefits based upon his military service during World War II from the Civil Service Commission on two occasions. Whether he prompted the payment of those benefits is not relevant on the face of the statute or the regulation." *Id.* at 26. The appellate court also rejected petitioner's challenge to the regulatory scheme, concluding that "the war wage credit statutory and regulatory schemes utilized by the [government] are congruous." *Id.* at 29.

ARGUMENT

The decision of the court of appeals is correct. Although there is a conflict between the decision below and the Eighth Circuit's 24-year-old decision in *Taylor* v. *Gardner*, 393 F.2d 257 (1968), that conflict does not warrant review by this Court because the question presented is neither significant nor recurring.

1. The court of appeals correctly rejected petitioner's argument that his World War II military service can be used to establish his eligibility for Social Security retirement benefits even though that same service was used to determine his Civil Service retirement benefits. The basis for petitioner's argument is his claim that he did not elect to receive the Civil Service benefits.[3] As the courts below correctly recognized, however, 42 U.S.C. 417(a)(2) makes clear that the relevant question is whether another federal benefit is "payable," not

if possible, seek administrative review and correction within the Civil Service Commission." Pet. App. 63.

[3] As a corollary to that claim, petitioner asserts that the Civil Service benefits were erroneously paid to him. Pet. 6, 8. Nothing in the record supports that assertion.

whether the veteran applied for that other benefit.[4] By its express terms, Section 417(a) provides that World War II military service is not to be counted in determining Social Security eligibility if another "benefit * * *, which is based, in whole or in part, upon * * * [that same service,] is determined by any agency * * * (other than the Veterans Administration) to be *payable by it* under any other law of the United States." 42 U.S.C. 417(a)(1)(B) (emphasis added).[5]

In this case, the Civil Service Commission twice determined that Civil Service retirement benefits were payable to petitioner based in part on his World War II service. Accordingly, petitioner is not entitled to Social Security retirement benefits, whether or not he applied for the Civil Service retirement benefits he received.

2. The decision reached by the courts below is consistent with the decisions of the majority of courts that have addressed the question presented here. *Kindig* v. *Ribcoff*, 202 F. Supp. 198 (E.D. Va. 1962) (former Marine held not entitled to Social Security disability insurance benefits because he had been determined to be entitled to Marine Corps retirement pay, even though he had elected instead to receive compensation from the Veterans Administration); *Morris* v. *Celebrezze*, 238 F. Supp. 717, 719 (E.D.N.Y. 1965) ("[s]ince it is undisputed

[4] In addition to asserting that the appellate court erred by finding that he had applied for Civil Service benefits, petitioner contends that the court's error was material to its holding. Petitioner's contention is meritless. As the court of appeals stated, "[w]hether [petitioner] prompted the payments of these benefits is not relevant on the face of the statute or the regulation." Pet. App. 26.

[5] In contrast to Section 417(a), Section 417(f)(1) expressly permits a surviving spouse or child to make an irrevocable waiver of the right to receive certain annuities. Thus, Congress knows how to write a statute to allow claimants to make a choice of benefits.

that wage credits for this period have been used in computing petitioner's annuity under the Civil Service Retirement Act * * *, the law is clear that petitioner cannot also use these credits for the purpose of receiving Social Security benefits"); and *Sutherland* v. *Flemming*, 189 F. Supp. 712, 713 (N.D. Ala. 1960) ("[t]he fact that a determination was made that the veteran was entitled to the benefit of retirement pay on account of his military service precludes the presumption that he was paid wages during such service"). See also *Moncrief* v. *Folsom*, 233 F.2d 471 (4th Cir. 1956) (holding that Section 417(e)(1)(B), which is similar to Section 417(a)(1)(B), provides that military service that had been considered in determining the amount of the claimant's retirement pay could not be credited for purposes of obtaining benefits under the Social Security Act).[6]

However, as petitioner states, the decision below conflicts with *Taylor* v. *Gardner*, 393 F.2d 257 (8th Cir. 1968). In that case, Taylor transferred to the Fleet Reserve after World War II and began receiving retirement benefits. Fourteen months later he attacked his wife, and she killed him in self defense. She and her disabled daughter later applied for Social Security benefits. The claim was denied on the ground that Taylor's military service could not be used to qualify for Social Security benefits because another benefit had already been determined to be payable based upon that service. A divided Eighth Circuit held that 42 U.S.C. 417(a) did not bar Taylor's military service from counting for Social Security purposes because he had been incompetent when he

[6] Petitioner's assertion to the contrary (Pet. 9-10) notwithstanding, nothing in *Sutherland* or *Moncrief* indicates that those courts considered the election made by the veteran to have any relevance to their decisions.

applied for transfer to the Fleet Reserve, which triggered his receipt of military retirement benefits.

Review is not warranted to consider this conflict. As an initial matter, *Taylor* is an aberration. As the dissent in that case demonstrated, the court's holding is contrary to the plain language of Section 417(a). In the 24 years since *Taylor* was decided, it has not been followed by any other reported decision.

Moreover, the question presented by this case and *Taylor* is unlikely to arise frequently in the future. Section 417(a) is limited to military service between September 16, 1940, and July 24, 1947, a period that closed more than 45 years ago. 42 U.S.C. 417(d).[7] Furthermore, the question presented arises only if a veteran receives some other federal benefit that he did not elect (or was not competent to elect) to receive. That is, petitioner's contention hinges on his claim that he did not elect to receive Civil Service retirement benefits, since it is entirely clear that he would not be able to count his military service toward the receipt of Social Security benefits if he applied for the Civil Service retirement benefits he received. It apparently is quite unusual for a veteran to receive benefits that he did not elect to receive (or was incompetent to elect to receive), and then seek, in effect, to disown those benefits—as the limited number of reported decisions addressing the question presented attest. Accordingly, the conflict between the decision below and *Taylor* need not be resolved by this Court.

[7] A similar provision, 42 U.S.C. 417(e)(1)(B), allows military service between July 25, 1947, and January 1, 1957, to be counted in establishing Social Security eligibility, but that period ended more than 35 years ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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